

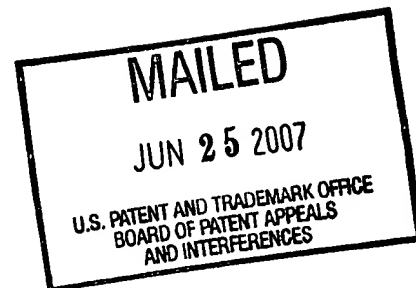
1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
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10 Ex parte PASCAL SIMON
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13 Appeal 2007-1135
14 Application 09/986,264
15 Technology Center 1600
16

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18 Oral Hearing Held: June 5, 2007
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22 Before DONALD E. ADAMS, LORA M. GREEN, and NANCY J. LINCK,
23 Administrative Patent Judges
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26
27 ON BEHALF OF THE APPELLANT:

28 DANIEL J. PEREIRA, Ph.D.
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1 JUDGE ADAMS: Thank you.

2 MR. PEREIRA: Good morning.

3 JUDGE ADAMS: Good morning, Mr. Pereira.

4 JUDGE GREEN: Good morning.

5 JUDGE ADAMS: We have a number of examiners from
6 Technology Center 3600, correct? And we're familiar with your issues.
7 You have 20 minutes and you can begin when you're ready.

8 MR. PEREIRA: Okay, thank you. I will try to keep my
9 comments brief and, of course, if you have any questions that any of you
10 have. We have two obvious rejections in this case. I think fundamentally
11 the issues are primarily on the first obvious rejection, that is a combination
12 of two -- references one U.S. patent, the U.S. 604 patent in Beckman and
13 APCT publication from Beck. I think as a starting point, I think many of the
14 -- well, all of the claims were rejected, at least the elected claims, and I don't
15 think the Examiner has made her case in all that have been rejected. There
16 are, there are some simple, broad inclusory statements that this would've
17 been obvious, but there really is no basis to make those conclusions. Now,
18 that's not to say that that's true for all of the claims, but I'm just saying there's
19 a large number of claims here, and the Examiner has not met the burden.

20 JUDGE ADAMS: Which ones, which ones in your opinion are
21 obvious?

22 MR. PEREIRA: I'm sorry?

23 JUDGE ADAMS: Which ones in your case are obvious?

24 MR. PEREIRA: Are obvious?

25 JUDGE ADAMS: You said that it's not true that the Examiner
26 hasn't made her case for obviousness of all the claims.

1 MR. PEREIRA: I didn't mean that -- I wasn't

2 JUDGE ADAMS: Oh, okay.

3 MR. PEREIRA: I'm sorry. I was trying to make a point while
4 in certain cases and certain -- or similar claims that she's made. A more
5 detailed discussion of the elements of that claim and many of the claims, that
6 is not the case. So I apologize if I was leading you to believe I was
7 conceding obvious --

8 JUDGE ADAMS: Just checking. I'm just checking.

9 MR. PEREIRA: -- at this point in time.

10 JUDGE ADAMS: Okay.

11 MR. PEREIRA: And so I think that's one of the fundamental
12 reasons I'm standing here, is I think some of those issues just -- never get a
13 reasoning from the Examiner. Secondly, and I think there are claims with
14 the prior art that she cited that does not describe or suggest limitations in the
15 claims, and that's not addressed at all. And I recognize that we have 15 or
16 20 minutes here, so I can't go through all the hundred and some claims.
17 Illustrative of this, I think, if we look at Claims 31 and 105, it has a container
18 in which these articles are contained and it specifically calls for the container
19 having a means for, a means for breaking the capsule and its article. That's,
20 as far as I can tell, not in the prior art that she cited, never really addressed it
21 and kind of says that, while it's obvious or it's in the rejection, but I think
22 we've explained already in the appeal brief, I think also in the reply brief.
23 It's not there. The --

24 JUDGE GREEN: Is it --

25 MR. PEREIRA: Sorry.

1 JUDGE GREEN: Excuse me, counsel. Is it in any other prior
2 art that you're aware of?

3 MR. PEREIRA: I don't have any knowledge of that. I mean, I
4 can't say for certain if that's true or not.

5 JUDGE GREEN: Thank you.

6 JUDGE ADAMS: So what is it about your containers that
7 causes this to -- these capsules to break according to your --

8 MR. PEREIRA: Well, as you'd imagine, there are a number of
9 embodiments --

10 JUDGE ADAMS: According to your specification.

11 MR. PEREIRA: Sure. One, I think, comes to mind. If you
12 could just bear with me for a second. I think it's Figure 12, but I want to
13 double check to make sure I have the right number. Yeah, Figure 12 is an
14 example of a means for breaking the capsule, which is discussed in more
15 detail on Page 44 of the originally filed specification. In that particular
16 body, you see the pair of rollers that, you know, if you were to -- we've all
17 seen a box of baby wipes, right, or something similar, where you pull these
18 things out through a little hole in the top. There, rather than just a hole, you
19 have these rollers that then burst the capsules as you remove them. That's, I
20 think, the basic concept here.

21 JUDGE GREEN: Now, would a container like the baby wipes
22 or the Lysol, where you have the pressure and you pull it up, your claim
23 doesn't require that it break all of the bubbles, just one of the bubbles.
24 Would that -- do you think that would meet that limitation? I realize that's
25 not the rejection before us. I understand that. But --

1 MR. PEREIRA: Well, I'm not, I'm not the mechanical guy, I'm
2 more of a chemical guy, and I don't know whether or not it would. I mean, I
3 have a package of baby wipes at home, but it doesn't have any capsules in it.
4 You know, I just don't know.

5 JUDGE ADAMS: Okay.

6 MR. PEREIRA: I'm not prepared to answer the question
7 truthfully or not, whether that would be the case. Perhaps accidentally it
8 could, but I'm not sure. All right. So I think, I think you kind of get
9 my point on these --

10 JUDGE ADAMS: Um-hum.

11 MR. PEREIRA: -- couple of issues so far. And -- and then it's
12 also the Applicant's position that the rejections are fundamentally based on a
13 flawed principle. That is, and I'm sure you'll correct me if I'm wrong, but
14 my understanding of the rejection, as it's been laid out, is that Beckman,
15 which is the prior art which describes capsules, bursting the capsules, and
16 the secondary reference of Beck describes a cosmetic composition
17 associated with a non-substrate, for example. And so then basically been
18 obvious to combine these disclosures to make an article with a the cosmetic
19 composition associated with the substrate and so breakable capsules.

20 JUDGE ADAMS: So Beckman also teaches these capsules
21 associated with some sort of towelette or a cotton swab or something like
22 that.

23 MR. PEREIRA: Yeah. Right. You're right. I didn't need to
24 throw that out the window. That's also there, you're correct. But I think,
25 you know -- go ahead.

1 JUDGE ADAMS: So I can give you some direction, why don't
2 we just take a look real briefly at Claim 1.

3 MR. PEREIRA: Okay.

4 JUDGE ADAMS: And tell me, just based on
5 Claim 1, why you think this combination of Beckman and Beck doesn't
6 reach the limitations of this claim.

7 MR. PEREIRA: Because it doesn't really get you to -- well,
8 because the prior art -- starting from the prior art, the prior art particularly in
9 Beck, which teaches a cosmetic composition, for example, basically soap
10 and conditioner, if you will, as a very basic idea. When you use these things
11 you have to use a pretty large amount of water. You're putting it under the
12 faucet, you're dumping it in a bucket of water, but you've got to generate the
13 -- Beck calls it water-activated.

14 JUDGE ADAMS: Um-hum.

15 MR. PEREIRA: That's basically where the art was. This is
16 what you needed to do if you have this dry type of substrate. The
17 alternative, or sort of the wet wipes, as I mentioned, sort of the baby wipes
18 as an alternative. But that's kind of really not what we're talking about here.
19 And so these guys here, these guys meaning the Applicants, thought, well, is
20 there a possible way to both present the user with everything he or she needs
21 in one particular device that's stable, it's easy, ready to use and, you know,
22 can be used on demand, so to speak.

23 JUDGE ADAMS: Um-hum.

24 MR. PEREIRA: And so with the burstable capsules, I mean,
25 it's in Beckman and I think we've even made it known in, at least the
26 response if not the appeal brief, that burstable capsule have been around, I

1 think, since the '50s, you know. That isn't really anything, per se, new,
2 having a burstable capsule filled with something. The idea here is that you
3 could control the amount of water or other liquid that would wet the
4 cosmetic composition, something that has --

5 JUDGE ADAMS: Okay. We're drifting away from, from
6 Claim 1.

7 MR. PEREIRA: Okay.

8 JUDGE ADAMS: Let's just take -- let's just take it piece by
9 piece.

10 MR. PEREIRA: Sure.

11 JUDGE ADAMS: Claim 1, a cosmetic article comprising. The
12 first thing that it comprises is a substrate.

13 MR. PEREIRA: Um-hum.

14 JUDGE ADAMS: Do you agree or disagree that both Beckman
15 and Beck teach a substrate?

16 MR. PEREIRA: Absolutely.

17 JUDGE ADAMS: Okay. (B) a cosmetic composition
18 associated with the substrate. Do you agree or disagree that both Beck and
19 Beckman teach a cosmetic composition associated with a substrate?

20 MR. PEREIRA: Beckman doesn't but Beck does.

21 JUDGE ADAMS: Okay. (C) at least one breakable capsule
22 associated with said substrate. Do you agree or disagree that both references
23 teach that?

24 MR. PEREIRA: Beckman teaches it, the breakable capsule;
25 Beck does not.

1 JUDGE ADAMS: Beck does not. Okay, let's take a look at
2 Beck. Let me find it here. Beck talks about articles that can compromise
3 multiple chambers. What is Beck talking about at Page 36, under the header
4 Multiple Chambered Embodiment?

5 MR. PEREIRA: In my view, that's not a capsule, a burstable
6 capsule. That's just a deviation of a substrate --

7 JUDGE ADAMS: Do you see where it says --

8 MR. PEREIRA: -- so far away from --

9 JUDGE ADAMS: Do you see the header that says Optional
10 Components? On that same page.

11 MR. PEREIRA: Yeah.

12 JUDGE ADAMS: Three lines above that it says that this
13 chamber can be, can be -- the composition in this chamber can be released
14 by puncturing, popping, bursting, squeezing, et cetera, of the chamber?

15 MR. PEREIRA: Um-hum.

16 JUDGE ADAMS: Okay. So Beck might not label it as a
17 capsule or a bubble or --

18 MR. PEREIRA: Right.

19 JUDGE ADAMS: -- a cell.

20 MR. PEREIRA: Um-hum.

21 JUDGE ADAMS: Because this chamber associated with the
22 substrate and he intends to have this chamber filled with something so that
23 when he squeezes it, if you will, it releases the composition onto the
24 substrate, is that correct?

25 MR. PEREIRA: Well, that's what it says there, but I --

26 JUDGE ADAMS: Okay.

1 MR. PEREIRA: -- still don't think it's a capsule. But I
2 understand your point.

3 JUDGE ADAMS: Okay. But that's what it says. So let's go
4 back to Claim 1. So in one or both of the prior art references we have all of
5 the limitations of Claim 1, is that right, A, B and C? Now, your idea about --
6 this idea about running it under water or getting it wet, does your claim
7 exclude that? You just have this towel, this towelette, this substrate.

8 MR. PEREIRA: Um-hum.

9 JUDGE ADAMS: You bust the capsule.

10 MR. PEREIRA: Um-hum.

11 JUDGE ADAMS: But it doesn't matter if you -- you can bust it
12 and then go soak it under water. Your claim doesn't exclude that.

13 MR. PEREIRA: Well, you could, but the idea here is that you
14 don't have to, that is, if you have a -- that wets the cosmetic composition.

15 JUDGE ADAMS: Does the claim, does the claim exclude it?

16 MR. PEREIRA: No, it doesn't exclude it.

17 JUDGE ADAMS: Okay.

18 JUDGE GREEN: And we have to give the claim so far as
19 reasonable interpretation.

20 MR. PEREIRA: No, I appreciate that.

21 JUDGE ADAMS: Okay.

22 MR. PEREIRA: But you know, I mean, that's why I gave you a
23 little mini historical --

24 JUDGE ADAMS: Um-hum.

25 MR. PEREIRA: -- perspective of where this came from and
26 why, you know, they came up with this arrangement.

1 JUDGE ADAMS: Right. Well, that's great, but we're still
2 confined by what the claim says.

3 MR. PEREIRA: Of course.

4 JUDGE ADAMS: Okay. So Claim 1 seems quite obvious, in
5 view of the combination, do you agree? Or if you do not, if you do not --

6 MR. PEREIRA: I wouldn't say disagree. I --

7 JUDGE ADAMS: If you do not, explain why, other than the
8 prior art may suggest that you need to run this towelette under water after
9 you break the capsule.

10 MR. PEREIRA: Right. And -- well, I respectfully disagree
11 that Beck actually teaches a burstable capsule --

12 JUDGE ADAMS: Okay.

13 MR. PEREIRA: -- or a breakable capsule. This is cheaper --

14 JUDGE ADAMS: Okay. Well, he does teach -- okay, if he
15 doesn't teach a capsule, he does suggest isolating a composition within a
16 substrate, and then later -- that contains a composition that can be released
17 on squeezing or -- whether he calls it a capsule or not, he calls it a chamber.
18 Okay, fine, I'm not going to argue the nomenclature, but he does teach an
19 isolated component within a substrate that can be busted to release the
20 composition.

21 MR. PEREIRA: Yes.

22 JUDGE ADAMS: Okay.

23 MR. PEREIRA: But that chamber in Beck is not a liquid-
24 containing chamber. It is something -- the purpose of it is completely
25 different.

1 JUDGE ADAMS: Okay. Well, what does it contain if it's not a
2 liquid?

3 MR. PEREIRA: A surfactant. It's basically to keep the
4 surfactant away from the conditioner.

5 JUDGE ADAMS: Okay. And neither one of those are liquids?

6 MR. PEREIRA: Well, not in -- according to Beck, because
7 Beck is a substantially dry substrate, having this composition on that is
8 "water-activated," that is, you're presenting the product in dry form to the
9 consumer for a variety of, you know, packaging and storage and some other
10 uses and whatnot.

11 JUDGE ADAMS: And then you bust the chamber that
12 comprises the composition, but that's not --

13 MR. PEREIRA: After you --

14 JUDGE ADAMS: -- that's not a, that's not a, that's not a liquid
15 or --

16 MR. PEREIRA: Not to my reading.

17 JUDGE ADAMS: Not according to you? Okay.

18 MR. PEREIRA: You know, I've certainly been wrong before --

19 JUDGE ADAMS: Okay.

20 MR. PEREIRA: I can't say I'm a hundred percent right, but in
21 my reading that's --

22 JUDGE ADAMS: Okay.

23 MR. PEREIRA: -- not what Beck is teaching.

24 JUDGE ADAMS: Okay. Other than, other than Claim 1 and
25 Claims 31 and 105, that discuss this idea of a container, is there any other
26 particular claim you'd like to direct our attention to here today --

1 MR. PEREIRA: No --

2 JUDGE ADAMS: -- to discuss?

3 MR. PEREIRA: -- because I think there's a number of claims.

4 I think, you know, the bigger issue is what we talked about.

5 JUDGE ADAMS: Okay. There's a few claims that talk about
6 effervescence, is that right?

7 MR. PEREIRA: Yes.

8 JUDGE ADAMS: Do you have one in mind, because I'm
9 looking for it right now.

10 MR. PEREIRA: There are a lot of claims. Just give me a
11 second, please.

12 JUDGE ADAMS: Let's take a look at Claim 62.

13 MR. PEREIRA: Yes.

14 JUDGE ADAMS: How does your specification define an
15 effervescent composition? You can take a few minutes.

16 MR. PEREIRA: I'm sure I looked at the definitions.

17 JUDGE ADAMS: You can take a couple minutes to look at it.

18 MR. PEREIRA: Okay. Well, do you have something in mind
19 or --

20 JUDGE ADAMS: I'm --

21 MR. PEREIRA: -- or are you just trying to figure it out as
22 well?

23 JUDGE ADAMS: Exactly.

24 MR. PEREIRA: Because I didn't --

25 JUDGE ADAMS: Um-hum.

1 MR. PEREIRA: I don't recall exactly how they define it. I
2 mean, my guess would be that it's defined in sort of a manner as it would be
3 known in this field -- giving, you know, basically a bubbling type of
4 reaction or --

5 JUDGE ADAMS: And what would be the purpose of this, to
6 disperse the composition? Is that the idea?

7 MR. PEREIRA: I think it aids in the cleansing and the
8 deposition of conditioning agents, for example, on the skin, if that's how you
9 were to use it, in other words, washing your face or something.

10 JUDGE ADAMS: Well, to enhance, to enhance the foaming of
11 the surfactant, according to, for example, Claim 62?

12 MR. PEREIRA: Yeah.

13 JUDGE ADAMS: So we're dispersing this composition?

14 MR. PEREIRA: Yes, I think that's probably accurate, and I
15 don't recall a contrary definition in the specification.

16 JUDGE ADAMS: I didn't either.

17 MR. PEREIRA: I'm sorry?

18 JUDGE ADAMS: I said I did not either.

19 MR. PEREIRA: Okay.

20 (Pause.)

21 JUDGE ADAMS: So this effervescent composition could be a
22 gas impregnated --

23 MR. PEREIRA: A gas generating composition, or something
24 to that effect.

25 JUDGE ADAMS: Okay.

1 MR. PEREIRA: I don't have first-hand knowledge, but I think
2 there's a number of examples in the art that sort of teach things that becomes
3 effervescent.

4 JUDGE ADAMS: So including these effervescent
5 compositions in cosmetic articles is quite common in the art, right?

6 MR. PEREIRA: I think there is other art that might suggest
7 that.

8 JUDGE ADAMS: Okay.

9 MR. PEREIRA: But I don't --

10 JUDGE ADAMS: But if you could look, if you would, at
11 Beckman, Column 3.

12 MR. PEREIRA: Beckman. Yes, right --

13 JUDGE ADAMS: At line 20.

14 MR. PEREIRA: Um-hum.

15 JUDGE ADAMS: He's talking generally about this capsule and
16 what this capsule can contain and the reason why you would want to put
17 different things in this capsule.

18 MR. PEREIRA: Sure.

19 JUDGE ADAMS: That starts about Line 20 and he's talking,
20 for example, a gas, right, at 22 to 23, the bridging sentence there? And then
21 drop on down to, to about Line 28 and 29 --

22 MR. PEREIRA: Um-hum.

23 JUDGE ADAMS: -- where you want to put this gaseous
24 substance in for the idea of either volatilizing or distributing the
25 components.

26 MR. PEREIRA: Um-hum.

1 JUDGE ADAMS: So how is that different than the
2 effervescent composition that you're suggesting in your claims?

3 MR. PEREIRA: Well, I think that by itself is not.

4 JUDGE ADAMS: Okay. Okay. Do you have anything else in
5 particular you'd like to bring to our attention?

6 MR. PEREIRA: No, sir.

7 JUDGE ADAMS: Any questions?

8 JUDGE GREEN: No.

9 JUDGE ADAMS: Thank you for your time.

10 MR. PEREIRA: Thank you --

11 JUDGE ADAMS: Um-hum.

12 (Whereupon, the proceedings concluded.)